

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 14207/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

15 August 2022

In the matter between:

**K2012150042 (SOUTH AFRICA) (PTY) LTD
(Registration number: 2012/150042/07)**

Applicant/Plaintiff

and

**MAZEL FOODS (PTY) LTD
(Registration No: 2017/303597/07)
T/A OCEAN BASKET**

1st Respondent / Defendant

**CHARLES VICTOR PENNY
(Identity No: [....])**

2nd Respondent / Defendant

JUDGMENT

Mdalana-Mayisela J

1. This is an opposed summary judgment application brought in terms of Rule 32 of the Uniform Rules of Court, as amended. The applicant is the plaintiff in the action that it has instituted against the defendants. In the particulars of claim the applicant

as plaintiff has predicated its case on the lease agreement that has been concluded between the applicant and the first defendant. The first defendant is the first respondent in the summary judgment application. The second defendant who is cited as the second respondent in the summary judgment application has been cited by virtue of him having signed a suretyship agreement in which he bound himself as surety to the debts of the first defendant. The application for summary judgment is brought against the first and second respondents.

2. The lease agreement was in respect of the premises described as Shop GF5/6, The Zone @ Rosebank Phase 2 situated at 31 Tyrwhitt Avenue, Rosebank, Johannesburg. The premises aforesaid were let to the first respondent in terms of a written lease agreement for purposes of the first respondent utilising the premises to conduct a restaurant business known as Ocean Basket.

3. The applicant has averred in the particulars of claim that subsequent to the conclusion of the lease agreement and due to the impact of Covid-19 in the businesses generally and in the country, two addendums to the lease agreement, the terms of which were incorporated into the lease agreement were concluded. This occurred after the lease agreement which had initially terminated due to the first respondent's breach was reinstated. The purpose of these addendums was to alleviate the financial burden on the first respondent due the Nation-wide lock down which was imposed by the government in order to lessen the impact and the spread of Covid-19.

4. According to the applicant, despite these concessions in the addendums which were to the benefit of the first respondent, the first respondent defaulted in its contractual obligations and remained in arrears with its rental payment. As a result, the applicant has averred that the first respondent is in breach of the contract and seeks payment of the sum of R1,347,270,01, eviction of the first respondent from the premises, confirmation of cancellation of the lease agreement, deed of reinstatement, first addendum and second addendum.

5. The applicant also claims damages arising from the first respondent's alleged breach of contract but prays for an order that payment of holding over damages,

reinstatement costs of the premises and payment of the unexpired portion of the lease period be postponed sine die for quantification purposes.

6. Rule 32 as amended now requires the defendant to file a plea before an application for summary judgment may be brought by the applicant. In this case, the respondents as defendants filed a plea, which resulted in the applicant delivering an application for summary judgment which is opposed by the respondents.

7. An application for summary judgment must be predicated on the assertion that the defendant(s) has no bona fide defence and the plea was filed solely for purposes of delay. The central question apart from whether the claim falls within the purview of summary judgment requirements is whether the defendants' plea as filed disclose a bona fide defence, and if not whether the plea was filed solely for purposes of delay.

8. In the plea filed by the defendants herein, whilst the defendants deny the averments of paragraphs 1 to 5.2 of the particulars of claim, it is not clear why these averments are denied. It is clear from the written lease agreement that the lease was concluded between the applicant and the first respondent and that the second respondent represented the first respondent in the conclusion of the lease agreement. The respondents' denial of these averments in the particulars of claim is bad in law, and constitutes no bona fide defence to particulars of claim.

9. Whilst the first respondent disputes the description of the premises and the ownership of the premises by the applicant, it is clear from the lease agreement that the parties concluded the lease in respect of the premises described in the lease agreement. I am satisfied that the premises in issue are owned by the applicant and a defence on this point is bad in law and constitutes no bona fide defence.

10. On a proper reading of the plea and having regard to the affidavit resisting summary judgment, I deal briefly with the eight points *in limine* raised by the first respondent in the affidavit resisting summary judgment. I however do not deal with each of them individually and separately as there is no need to do so.

11. The first issue to be disposed off is whether the claim is one that falls within the requirements of summary judgment. The plaintiff is only entitled to seek summary judgment on a claim that is a liquidated claim; a liquid document; delivery of specified movable property or for ejectment. There can be no claim for summary judgment on an illiquid claim such as a claim for damages or specific performance.

12. The question is whether the applicant's claim is a liquid claim sounding in money and capable of being easily ascertainable without resort to extrinsic evidence. In *Rich & Others v Lagerwey 1974 (4) SA 748 (AD) at 754*, the court dealt with this very issue and concluded that if on a proper construction the document evidences by itself that the claim is one sounding in money, without extrinsic evidence required, such document would meet the test for summary judgment.

13. In *Botha v W. Swanson and Co. (Pty) Ltd 1968 (2) PH F85 (C)* the court affirmed the same principle that if a claim is not one based on a liquidated amount in money summary judgment is not an appropriate remedy. If the ascertainment of the money so claimed is a matter of calculation, then summary judgment is availed to the plaintiff.

14. The applicant's claim is based on arrear rental amounts which have not been paid. Such amounts are easily ascertainable by mere calculation. The claim for damages does not fall within the purview of summary judgment, hence the order in that regard will be incompetent. A claim for ejectment which in essence is eviction is competent in summary judgment. What remains is whether the court may at summary judgment stage grant an order for the confirmation of the cancellation of the lease agreement. The respondents aver that such an order is not competent at summary judgment stage. I am of the view that an order for confirmation of cancellation of the lease agreement is competent in summary judgment as it will be linked to an order of ejectment.

15. The claim for damages is however not entertained here. I am of the view that there is no merit in any of the eight legal objections that have been raised by the respondents. The first respondent has not proffered any bona fide defence to the claim and summary judgment should accordingly be granted.

16. Accordingly, the following order is made:

1. The respondents/defendants are ordered to pay to the applicant/plaintiff the sum of R1,347,270,01.
2. Interest on the aforesaid sum at the rate of 2% per month a tempore morae.
3. Confirmation that the lease agreement, deed of reinstatement, the first and second addendums have been cancelled.
4. The first respondent or any person occupying the premises under or through the first respondent is hereby evicted from the premises forthwith.
5. In respect of the remainder of the claims, the respondents/defendants are granted leave to defend and the usual rules of court pertaining to filing of pleadings and discovery processes will apply.
6. The costs of the application for summary judgment are costs in the trial.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 15 August 2022

Appearances:

On behalf of the Applicant:	Adv A Salduker
Instructed by:	Le Roux Vivier Attorneys
On behalf of the respondent:	Adv JK Maxwell
Instructed by:	Eugene Marais Attorneys